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No. 85-2151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VASILIKI NISIOTAKIS, CONSTANDINOS NISIOTAKIS, and STELLA NISIOTAKIS, individually; CHRISTOS NISIOTAKIS, a minor, and KOSTAS NISIOTAKIS, a minor, by and through their Guardian ad Litem, EUGENE J. MARSHALL; as heirs of THEODOROS NISIOTAKIS, deceased,

Petitioners,

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, a corporation

and

STENCEL AERO ENGINEERING CORPORATION, a subsidiary of TALLEY INDUSTRIES, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented are whether the Fourth Circuit Court of Appeals erred in failing to defer to the presiding District Court Judge for the Southern District of Ohio[,] Eastern Division in his interpretation and construction of Ohio law; and whether this failure to defer resulted in a denial of due process of law.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion entered on February 27, 1986 (App. A, *infra*, pp. 1a-10a).

Petition suggesting hearing by the Court of Appeals *in banc* was filed on March 13, 1986 (App. B, *infra*, pp. 11a-14a), and this petition was denied by the Court of Appeals in unpublished order entered on April 1, 1986 (App. C, *infra*, pp. 15a-16a).

Further opinions below, necessary to consider the issues in this petition, are the unpublished opinion and order of Woodrow W. Jones, United States District Judge, W.D., N.C., filed December 17, 1984 (App. D, *infra*, pp. 17a-24a); and four orders and opinions of Joseph P. Kinneary, United States District Judge, S.D., Ohio: (a) Order of October 27, 1982, applying the wrongful death statute of limitations of Greece in Ohio, under Ohio choice of law rules, and thus denying summary judgment to Defendant Rockwell (App. E, *infra*, pp. 25a-32a); (b) Opinion and order of April 6, 1983, denying Defendant Rockwell's motion to reconsider the previous denial of summary judgment (App. F, *infra*, pp. 33a-35a); (c) Opinion and order of June 27, 1984, in response to motion of Defendant Stencel to dismiss or in the alternative, for summary judgment (App. G, *infra*, pp. 36a-43a); (d) Order of July 31, 1984, transferring the lawsuit from the United States District Court for the Southern District of Ohio, to the United States District Court for the Western District of North Carolina (App. H, *infra*, p. 44a).

JURISDICTION

Denial of petitioners' suggestion for hearing *in banc* to the United States Court of Appeals for the Fourth Circuit was entered on April 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sec. 2125.01 of the Ohio Revised Code states as follows:

> When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover dam-

ages if death had not ensued, the corporation which or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it murder in the first or second degree, or manslaughter. When the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person.

When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance thereof.

Sec. 2125.02 of the Ohio Revised Code states as follows:

An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent. The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought, and the reasonable funeral expenses incurred as a result of the wrongful death. In its verdict the jury shall set forth separately the amount of damages, if

any, awarded for reasonable funeral expenses. Except as otherwise provided by law, every such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid.

Section 2125.01 of the Ohio Revised Code was amended on February 5, 1982, and reads as follows:

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be com-

menced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance of such cause of action.

Section 2125.02 of the Ohio Revised Code was amended on February 5, 1982, and reads as follows:

(A) (1) An action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

(2) The jury, or the court if the action is not tried to a jury, may award damages authorized by divisions (B) and (C) of this section, as it determines are proportioned to the injury and loss resulting to these beneficiaries by reason of the wrongful death, and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3) The date of the decedent's death fixes the status of all beneficiaries of the action for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is

born alive after his death is a beneficiary of the action.

In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(B) Compensatory damages may be awarded in an action for wrongful death and may include damages for the following:

(1) Loss of support from the reasonably expected earning capacity of the decedent;

(2) Loss of services of the decedent;

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, minor children, parents, or next of kin;

(4) Loss of prospective inheritance, to the decedent's heirs at law at the time of his death;

(5) The mental anguish incurred by the surviving spouse, minor children, parents, or next of kin.

(C) A personal representative appointed in this state, with the consent of the court making the appointment, may, at any time before or after the commencement of an action for wrongful death, settle with the defendant the amount to be paid.

(D) All actions for wrongful death shall be commenced within two years after a decedent's death.

STATEMENT OF THE CASE

Plaintiffs initially filed suit on August 29, 1978, in the Superior Court of the State of California, alleging that the deceased Theodoro Nisiotakis, a citizen of Greece and a pilot in the Greek Armed Forces, was killed

when the ejection seat for the T-2E jet aircraft he was flying malfunctioned and the aircraft subsequently crashed on July 8, 1977. On March 10, 1980, all proceedings were stayed pending initiation of further proceedings in a more convenient forum. On November 2, 1981, Plaintiffs instituted suit in the Common Pleas Court, Franklin County, Ohio, seeking to recover damages for the alleged wrongful death of Theodoros Nisiotakis. Service of process was had on the Defendant, the Columbus Division of Rockwell International Corporation. The case was removed to the United States District Court for the Southern District of Ohio, Eastern Division, on December 3, 1981, upon the request of the Defendant Rockwell.

Rockwell filed its answer on February 4, 1982, and moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure on May 12, 1982, on the grounds that the Ohio two-year statute of limitations had run and was a bar to the Plaintiffs' claim, even though the accident and death of Nisiotakis had occurred in Greece, not in Ohio.

On August 9, 1982, Defendant Stencel Aero Engineering Corporation was served with process. On September 20, 1982, Defendant Stencel filed its answer.

On October 27, 1982, the Ohio court ruled on Defendant Rockwell's motion for summary judgment and held that under the Ohio Revised Code, Section 2125.01, the court must look to the relevant statute of limitations applicable to the wrongful death action under Greek law. The court thereafter found that the Greek statute allowed five years from the time the victim learned of the damage and of the person obligated to make reparations, in which to file suit. In that the death occurred on July 8, 1977, and suit was filed on November 2, 1981, the court ruled that the action had been timely filed and denied Rockwell's motion for summary judgment (App. E, *infra*, pp. 25a-32a). Defendant Rockwell's subsequent motion for

econsideration of the denial of its motion for summary udgment was denied. (App. F, *infra*, pp. 33a-35a).

On June 20, 1983, Defendant Stencel moved to dismiss he action based upon lack of jurisdiction and moved for ummary judgment, alleging that the action was barred y the Ohio two-year statute of limitations. The court, n its order (App. F, *infra*, pp. 33a-35a), found that the Plaintiffs had failed to sustain their burden in showing hat the Defendant Stencel was transacting business in he state of Ohio and, therefore, amenable to the personal urisdiction of that court. The court, however, did not lismiss the action as to Defendant Stencel; it denied the Plaintiffs' motion to transfer the action back to Cali-ornia and indicated it would favorably entertain a mo-ion to transfer the action pursuant to 28 U.S.C. § 1406 (a) to some other forum where personal jurisdiction may exist.

On July 31, 1984, Judge Joseph Kinneary transferred he lawsuit to the United States District Court, Western District of North Carolina, Asheville Division, "in the interests of justice" (App. H, *infra*, p. 44a).

On November 6, 1984, in North Carolina, Defendant Rockwell moved for summary judgment, alleging that the lawsuit was barred by the applicable statute of limitations of North Carolina.

On November 9, 1984, in North Carolina, Defendant Stencel moved to dismiss, alleging lack of jurisdiction over the Defendant or the subject matter, insufficiency of process and service of process, and failure to state a claim upon which relief may be granted. Defendant Stencel also moved for summary judgment, alleging that the claim was barred by the statute of limitations of North Carolina.

On December 17, 1984, Woodrow W. Jones, United States District Judge, granted the Defendants' motions for summary judgment and dismissed the action against

Defendant Rockwell and Defendant Stencel, applying North Carolina law to the case (App. D, *infra*, pp. 17a-24a).

On appeal from Judge Jones' dismissal, the United States Court of Appeals for the Fourth Circuit, in its opinion, reevaluated the law of Ohio that had previously been ruled upon by the United States District Judge sitting in Ohio. The court determined that the two-year Ohio statute of limitations for wrongful death overrode the "borrowing" section of the Ohio Code and ruled that the actions against Defendant Rockwell and Defendant Stencel were thus barred by the two-year Ohio statute of limitations (App. A, *infra*, pp. 1a-10a)

REASONS FOR GRANTING THE WRIT

In this case, the United States Court of Appeals for the Fourth Circuit, reviewing the case after it arrived in the Fourth Circuit under a transfer order from the federal trial court in Ohio, disposed of the case by interpreting the Ohio conflict of laws rules differently from the interpretation given by the United States District Judge sitting in Ohio, regarding the laws of his state.

In its evaluation of Ohio law, the Court of Appeals for the Fourth Circuit was incorrect, apparently overlooking controlling decisions by the Ohio courts interpreting the same laws.

Petition should be granted in this case to emphasize further the desirability of having federal appellate courts defer to trial courts sitting in the states whose laws are being interpreted, on questions of interpretation of state law. Only by such a wise deferral to the expertise of the trial courts, reviewing these decisions under the "clearly erroneous" standard set out by this Court in *Anderson v. City of Bessemer City*, —— U.S. ——, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), can an orderly functioning of the

federal court system be assured and errors of interpretation of state law affecting federal litigants be minimized.

I. The Court of Appeals should have upheld the decision of the Ohio United States District Judge.

In the decision by the United States Court of Appeals for the Fourth Circuit, it is stated that

> the Ohio district judge erred by failing to give proper consideration to a recent, retroactive amendment to the Ohio Revised Code which mandates the filing of all wrongful death suits in Ohio within two years after the decedent's death. (App. A, *infra*, at p. 5a)

This Court has held that there is a strong presumption that a decision by a district court judge, presiding in the state where the action originally was heard, is the correct interpretation of the state law. *Bishop v. Wood*, 426 U.S. 314, 49 L.Ed.2d 684, 96 S.Ct. 2074 (1976). In that decision, this Court referred to *United States v. Durham Lumber Co.*, 363 U.S. 522, 4 L.Ed.2d 1371, 80 S.Ct. 1282 (1960) and *Propper v. Clark*, 337 U.S. 472, 93 L.Ed. 1480, 69 S.Ct. 1333 (1949). In footnote 10, in *Bishop, supra*, the Court citing *Propper, supra*, at 486-487, stated

> The precise issue of state law involved, i.e., whether the temporary receiver under Section 977-b of the New York Civil Practice Act is vested with title by virtue of his appointment, is one which has not been decided by the New York courts. Both the District Court and the Court of Appeals faced this question and answered it in the negative. In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.

It is suggested that a United States District Judge knows the law of the state in which he sits far better than a federal trial or appellate judge sitting in a differ-

ent state or circuit. Further, judicial economy and a desire to minimize friction on transfer of cases support appellate courts' deference to lower court decisions.

The decision by the Fourth Circuit Court of Appeals appears to be incorrect as it interprets Ohio law. The case cited in the opinion of the court as controlling is *French v. Dwiggins*, 9 Ohio St. 3d 32, 458 N.E. 2d 827 (1984). Judge Sneeden, in the opinion of the United States Fourth Circuit Court of Appeals, stated that he believed in reading the 1982 amendment to the Ohio Code, as well as *French, supra*, that the Legislature clearly intended to "place a two-year cap on the amount of time within which *all* wrongful death actions may be commenced" (App. A, *infra*, at p. 8a). However, in looking at the decision of the Ohio Supreme Court in *French, supra*, we find that that decision in that case centered on a controversy as to whether an expansion of the damages a party could recover in a wrongful death action would be allowed. Under the 1982 amendment to the Ohio Code, the amount of damages allowed in a wrongful death action was greatly expanded. The Ohio Supreme Court, in looking at the facts in that case, stated that it interpreted legislative intent to be such that the measure of damages should be expanded, thereby applying the statute retroactively to a case that was pending at the time of the amendment to the Ohio Code, Section 2125.02. The Ohio Supreme Court did not address the issue of whether the amended statute would apply to other cases pending at that time in determining what statute of limitations should apply in wrongful death actions. The Ohio Supreme Court stated in *French, supra*, that the 1982 amendment would allow greater damages than the pre-existing statutes.

The Court of Appeals, in its evaluation of Ohio law, apparently missed other relevant case law of Ohio, which it did not cite. In speaking to the effect of the amendment to the Ohio Code Section 2125.02, the Court of

Appeals of Ohio stated on December 17, 1984, in *Taylor v. Black & Decker Mfg. Co., a.k.a. Black & Decker (U.S.), Inc.*, 21 Ohio App. 3d 186, 486 N.E. 2d 1173 (1984), that "the Court in *Dwiggins, supra*, held that the amended version of the statute amply provided for the scope of recovery for those entitled to receive damages in a wrongful death action. RC 2125.02 as amended, was remedial in nature due to a change in the existing duties, rights, obligations and elements in order to impose additional ones. The legislative amendments did not alter any of the substantive aspects of the wrongful death action." *See also Ball v. Victor K. Browning & Co., Inc., et al.; Union Carbide Corp.*, 21 Ohio App. 3d 175, 487 N.E. 2d 326 (1984).

The Court of Appeals ignored the fact that Section 2125.01 of the Ohio Revised Code, as amended in 1982, specifically provides for the use of a foreign statute of limitations in Ohio for actions arising in that foreign country. This section of the Ohio Revised Code is substantially the same as the provision prior to 1982 and was the basis of Judge Kinneary's decision. If the Ohio legislature had intended to place a two-year cap on all wrongful death actions, Section 2125.01 would have been omitted.

The theoretical basis, history, public policy, and interpretation of the relevant Ohio Statutes were carefully evaluated by United States District Judge Joseph P. Kinneary, in his orders and opinions, App. E, F, and G, *infra*. It is regrettable that the Fourth Circuit Court of Appeals disposed of the case by simply disagreeing with the interpretation of Ohio's laws, reached by the federal judge sitting in that state. Such practice does not promote judicial economy and uniformity, nor does it do justice to litigants by having the courts with the most expertise in matters of state law speak with authority on those matters.

II. Plaintiffs are denied due process of law, by an *ex post facto* amendment to the Ohio statute, taking away their rights, if the interpretation of Ohio law by the Court of Appeals is sustained.

At the time of the filing of their lawsuit in Ohio, in November, 1981, Section 2125.01 of the Ohio Revised Code clearly provided for the "borrowing" of the five-year Greek statute of limitations, since the wrongful death claim arose under the laws of Greece. The Court of Appeals is taking the position that the Ohio legislature subsequently changed the law. As suggested above, it is argued that the Court of Appeals has misapplied Ohio law in this regard.

The effect of what the Court of Appeals has done is to take away from the Plaintiffs a property right, the right to pursue a Greek cause of action for wrongful death in Ohio, vested under Ohio law when their lawsuit was filed.

Such an unjust result, and the consequent denial of procedural due process of law predicated in the loss of a valuable property right, are wholly unnecessary, if the Court of Appeals would wisely defer to the expertise of the Ohio court, in interpreting the laws of Ohio, as argued herein.

CONCLUSION

The Court should review this case to assure uniformity of interpretation of matters of unique state law application among the federal courts by clearly re-emphasizing the principle of deference to the expertise of trial courts sitting in the state whose laws are being interpreted, as set out by this Court in *Anderson v. City of Bessemer City*, —— U.S. ——, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) and *Bishop v. Wood*, 426 U.S. 314, 49 L.Ed.2d 684, 96 S.Ct. 2074 (1976).

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

85-1006 (L)

VASILIKI NISIOTAKIS; CONSTANDINOS NISIOTAKIS and STELLA NISIOTAKIS, individually; CHRISTOS NISIOTAKIS, a minor, and KOSTA NISIOTAKIS, a minor by and through their Guardian ad Litem, EUGENE J. MARSHALL; as heirs of THEODOROS NISIOTAKIS, deceased,

Appellants,

versus

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, a corp.; STENCEL AERO ENGINEERING CORP., a subsidiary of TALLEY INDUSTRIES, INC., a corp.,

Appellees.

85-1040

VASILIKI NISIOTAKIS; CONSTANDINOS NISIOTAKIS and STELLA NISIOTAKIS, individually; CHRISTOS NISIOTAKIS, a minor, and KOSTA NISIOTAKIS, a minor by and through their Guardian ad Litem, EUGENE J. MARSHALL; as heirs of THEODOROS NISIOTAKIS, deceased,

Appellants,

versus

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, a corp.,

Appellant,

and

STENCEL AERO ENGINEERING CORP., a subsidiary of TALLEY INDUSTRIES, INC., a corp.,

Defendant.

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville
Woodrow W. Jones, District Judge
(C/A 84-294)

Argued: July 31, 1985 Decided: February 27, 1986

Before WIDENER, CHAPMAN, and SNEEDEN, Circuit Judges.

James H. Toms; Ervin W. Bazzle (Toms and Bazzle, P.A. on brief) for Appellants; Harry Dumont; Hada V. Haulsee (Theodore M. Munsell; Collis Gundy Lane; Lane, Alton & Rice on brief) for Appellees.

SNEEDEN, Circuit Judge:

This is a complicated conflict of laws case stemming from a plane crash in Greece. Plaintiffs filed a wrongful death action in the state of Ohio against the manufacturers of the airplane and the plane's ejection seat system. The case was transferred to North Carolina because the Ohio trial court lacked personal jurisdiction over the ejection seat manufacturer. However, the North Carolina trial judge found that, under North Carolina law, the suit was untimely. Accordingly, he dismissed the action against the defendants with prejudice.

Plaintiffs appealed the North Carolina court's ruling. A cross appeal was filed by the defendants, alleging the trial judge in Ohio erred in refusing to find the suit time barred in that state. For the following reasons, we affirm the dismissal of the action.

I.

The procedural history of this case spans many years and several states. On July 8, 1977, Theodoros Nisiotakis was killed when the airplane he was flying crashed in Greece. The plaintiffs in this action, the dependents of Mr. Nisiotakis, filed suit against the Columbus Aircraft Division of Rockwell International Corporation, the manufacturers of the airplane, and Stencel Aero Engineering Corporation, the manufacturer of the aircraft's ejection seat system. The suit sought damages for the alleged wrongful death of Nisiotakis, a citizen of Greece.

Plaintiffs originally filed the wrongful death suit in the Superior Court of California in Los Angeles on August 29, 1978. The defendants moved to dismiss on *forum non conveniens* grounds. In March of 1980, the superior court judge entered an order staying all proceedings pending the initiation of action in a more convenient form. However, in July of 1980, plaintiffs filed a suit in Federal District Court for the Central District of California. This action was never served on Rockwell. The district court, on its own motion, dismissed the case for lack of prosecution on March 3, 1981.

On November 2, 1981, the plaintiffs initiated the present action by filing a complaint in an Ohio Court of Common Pleas. Later, the action was removed to the federal district court in Ohio. Rockwell sought to have the federal court dismiss the claim. On May 12, 1982, the company moved for summary judgment, claiming that the action was barred by Ohio's two-year statute of limitations for wrongful death. This motion was denied in October of 1982. The trial court determined that, under Ohio choice of law rules, the five-year Greek statute of limitations applied. Applying the Greek statute, the trial judge held the suit was timely.

On June 20, 1983, Stencel filed a motion to dismiss the action against it for lack of personal jurisdiction.[1] The trial court responded by issuing an order in which it refrained from ruling until the plaintiffs could request a transfer pursuant to 28 U.S.C. § 1406(a)[2] to a forum where personal jurisdiction for defendant Stencel may exist. The plaintiffs subsequently moved for a change in venue to a federal district court in North Carolina pursuant to 28 U.S.C. § 1404(a)[3] and 28 U.S.C. § 1406(a). This request was granted in a July 31, 1984 order that did not specify the statutory grounds for the transfer.

The move to North Carolina did not produce the results the plaintiffs had hoped for, however. On November 6, 1984, Rockwell moved for summary judgment contending the action was barred by the applicable North Carolina statute of limitations. Three days later, Stencel filed a similar motion.[4] These motions were granted December 17, 1984. From this decision plaintiffs appeal.

---

[1] Stencel is a corporation organized under North Carolina laws. Its only facilities are located in Asheville, North Carolina and Hurricane Mesa, Utah. All of Stencel's products are designed and manufactured in North Carolina. The Utah facility is used solely for product testing. Stencel therefore claimed that it did not have sufficient minimum contacts with Ohio such that maintenance of the suit would not offend traditional notions of fair play and substantial justice. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[2] Section 1406 states in pertinent part that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a).

[3] Section 1404 provides in pertinent part that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. 1404(a).

[4] Stencel also filed a motion for judgment on the pleadings, a motion to dismiss for lack of jurisdiction over the defendant and

Two questions form the basis of the present appeal. First, which state's choice of laws rule should have been applied following the transfer from Ohio to North Carolina? Second, did the Ohio district court correctly apply the law of that state in concluding that the plaintiff's suit was timely? We need not address the first issue because our decision on the second issue controls the outcome of the case. We hold that the Ohio district judge erred by failing to give proper consideration to a recent, retroactive amendment to the Ohio Revised Code which mandates the filing of all wrongful death suits in Ohio within two years after the decedent's death.

II.

The Ohio district court found, and all parties apparently agree, that Ohio law must be examined to determine the appropriate statute of limitations governing a foreign action for wrongful death filed in that state.[5] The parties' disagreement centers on the relationship between two Ohio statutory provisions.

The focus of the dispute is whether a provision outlining a two-year statute of limitations for wrongful death suits in Ohio overrides another code section that permits the borrowing of a foreign country's statute of limitations. The Ohio district court described the problem this way:

> Defendant Rockwell insists that Ohio Revised Code Section 2125.02 is the controlling statute of limitations. Rockwell correctly states that plaintiff's cause of action under Ohio law has expired. See Ohio Rev. Code Ann. § 2125.02 (Anderson 1981). However, the

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the subject matter, a motion to dismiss for insufficiency of process and service of process as well as a motion to dismiss for failure to state a claim for which relief could be granted. Joint Appendix at pp. 118-120.

[5] *See* Appellant's Brief at 7; Appellee's Brief at 25.

plaintiff's cause of action is brought under the Greek Wrongful Death Act and not the Ohio Act. Therefore, Section 2125.02 is not necessarily controlling. Section 2125.02 states in relevant part:

> *Except as otherwise provided by law*, every such action [for wrongful death] must be commenced within two years after the death of such deceased person. Ohio Rev. Code Ann. § 2125.02 (emphasis added).

However, Section 2125.02 does not apply in the instant case because the law clearly provides otherwise.

> When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. *Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.* Ohio Revised Code § 2125.01 (emphasis added).

Thus, Section 2125.01 requires that the Court look to the relevant statute of limitations applicable to wrongful death actions under Greek law.

Joint Appendix at 58-59 (emphasis supplied by court). The court found that, under Greek law, plaintiffs had five years in which to file a wrongful death suit.*

The district court's analysis is flawed in one important respect, however, the court relies on a statutory provision, section 2125.01, that was altered significantly by a 1982 amendment. *See* Ohio Rev. Code Ann. § 2125.02 (Page 1985). The Ohio Supreme Court has ruled the

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* Joint Appendix at 60.

amended version of the statute is to be applied retroactively to all wrongful death actions. *See French v. Dwiggins*, 9 Ohio St. 3d 32, 458 N.E.2d 827 (1984).[7] A comparison of the old and new versions of section 2125.02 demonstrates the Ohio legislature's efforts to clarify the controlling nature of that provision.

Before it was amended, section 2125.02 stated in pertinent part that "[e]xcept as otherwise provided by law, every such action [for wrongful death] must be commenced within two years after the death of such deceased person." *See* Ohio Rev. Code Ann. § 2125.02 (Anderson 1981). In his October 27, 1982 order, the trial judge placed great emphasis on the phrase "[e]xcept as otherwise provided by law."[8] That language was omitted from the statute by the 1982 amendment, however. The statute now states that "[*a*]*ll actions* for wrongful death shall be commenced within two years after a decedent's death." Ohio Rev. Code Ann. § 2125.02 (d) (Page 1985) (emphasis added).

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[7] The legislative amendment to section 2125.02 became effective February 5, 1982. This action was filed in state court in Ohio on November 2, 1981. Although at first blush it may appear that the amendment could not affect a suit filed before its effective date, the Ohio Supreme Court has clearly stated that the amended section 2125.02 "applies to all wrongful death actions *tried* in any forum on or after that [February 5, 1982] date." *French*, 458 N.E.2d at 831 (emphasis added). This case was actually tried months later than February of 1982. Defendant Stencel was not served with process until August 9, 1982. Furthermore, it was not until October of 1982 that the Ohio district court rejected Rockwell's assertion that section 2125.02 made the plaintiffs' suit untimely and refused to grant the defendant's motion for summary judgment. *See also Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) (holding that in an action filed before, but tried after, the 1982 effective date of amended section 2125.02, the trial court erred in denying the plaintiff an opportunity to prove damages under the amended version of the statute.)

[8] Joint Appendix at 59.

We believe the 1982 amendment clearly indicates the Ohio legislature's intent to place a two-year cap on the amount of time within which *all* wrongful death actions may be commenced. Plaintiffs have argued that this interpretation of the 1982 amendment would, in effect, render void the statutory section that permits the borrowing of a foreign country's statute of limitations. Section 2125.01 states, however, that when a foreign country's right of action is enforced in Ohio, "[e]very such action shall be commenced *within* the time prescribed by the commencement of such action by the statute of such other state or foreign country." (emphasis added). We believe a common sense reading of the "within the time prescribed" language of Section 2125.01 merely prevents a plaintiff from prosecuting a suit in Ohio if his right to do so has lapsed in the foreign country. Thus, the foreign statute of limitations could only serve to shorten the period of time in which a plaintiff would be required to file suit in Ohio. Giving effect to both the Ohio and the Greek statutes of limitations, the claim must be filed within the five year period prescribed by Greek law, but in no event may it be pursued in Ohio more than two years after the decedent's death.[9]

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[9] To support their argument that section 2125.01 dictates the adoption of a five-year statute of limitations in this case, appellants cite *Fox v. Motor Freight*, 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971). In *Fox*, the Ohio Supreme Court uses language which suggests that a foreign state or country's statute of limitations would be incorporated into section 2125.02. *Fox*, 25 Ohio St. 2d at 197. However, *Fox* was decided eleven years before the Ohio General Assembly amended section 2125.02 to declare that *all* wrongful death actions must be brought within two years in that state. Furthermore, the language in *Fox* upon which appellants rely states only that the Ohio legislature intended to incorporate the foreign state or country's statute of limitations into section 2125.01. The incorporation would not exclude Ohio's statute of limitations. Rather, as we have explained, *both* statutory provisions must be complied with.

With plain language, and providing no exceptions, the legislature of Ohio mandated in section 2125.02 that *all* wrongful death actions must be filed within two years of the decedent's death in that state. The plaintiffs filed this claim more than four years after Theodoros Nisiotakis' death. It is therefore time barred under the Ohio statute of limitations.

III.

For the foregoing reasons, we affirm the dismissal of the plaintiffs' claims.

Affirmed.

WIDENER, Circuit Judge, concurring:

I concur in the result reached by the panel.

I also concur in the opinion of the panel as to the defendant Rockwell.

As to the defendant Stencel I believe that North Carolina's choice of law rules apply and would affirm the district court's judgment for the reasons stated in its opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Record Nos. 84-1006 (L)
85-1040

VASILIKI NISIOTAKIS; CONSTANDINOS NISIOTAKIS and STELLA NISIOTAKS, individually; CHRISTOS NISIOTAKIS, a minor, and KOSTA NISIOTAKIS, a minor by and through their Guardian ad Litem, EUGENE J. MARSHALL; as heirs of THEODOROS NISIOTAKIS, deceased,

Appellants,

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, a corp., and STENCEL AERO ENGINEERING CORP., a subsidiary of TALLEY INDUSTRIES, INC., a corp.,

Appellees,

[Filed Mar. 14, 1986]

PETITION SUGGESTING HEARING BY THE COURT OF APPEALS IN BANC UNDER FRAP 35

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Now come the Plaintiff/Appellants, who respectfully petition that the United States Court of Appeals for the Fourth Circuit rehear this case *in banc*, as provided in Rule 35, Federal Rules of Appellate Procedure. We respectfully suggest that the present proceeding involves a question of exceptional importance, that is, whether a cause of action for wrongful death arising under the laws of Greece may be denied enforcement in the United States against a United States defendant, by construing Ohio law retrospectively to prevent the prosecution of the claim. The present suit was initiated in the courts of Ohio, and removed to the Federal District Court in Ohio, wherein the Defendant Rockwell sought unsuccessfully to have the Federal Court dismiss the claim, asserting that the action was barred by Ohio's two year statute of limitations for wrongful death. Rockwell sought this dismissal even though the five year Greek statute of limitations had not run. The trial court determined that under Ohio choice of law rules, the five year Greek statute of limitations applied and thus held that the suit was timely filed in Ohio. The law suit then was transferred to the Western District of North Carolina, due to lack of *in personam* jurisdiction over Stencel Aero Engineering Corporation, the other defendant, a sub-assembler of the aircraft in which Theodoris Nisiotakis, a Greek Air Force Officer, was killed in Greece. In North Carolina, the United States District Court applied North Carolina law to the case and dismissed the law suits against Rockwell and Stencel, and an appeal then followed to this Court.

The panel of this Court which issued its opinion on February 27, 1986, in this law suit, re-evaluated the law of Ohio which had previously been considered by the United States District Judge sitting in Ohio when he denied Rockwell's Motion for Summary Judgment, and the appellate court determined that the two year Ohio statute of limitations for wrongful death overrides the

"borrowing" section of the Ohio Code that permits a foreign country's statute of limitations be used when enforcing a foreign cause of action in Ohio. The panel of this Court writing its opinion determined that an amendment to Section 2125.02, Ohio Revised Code Annotated, in 1982, after the filing of this law suit in Ohio, demonstrated the intention of the Ohio Legislature to cause that two year statute of limitations to be controlling over the "borrowing" statute which remains on the books as the law of Ohio.

The effect of this Court's opinion is to construe Ohio law as establishing an absolute cap of two years on the filing of any law suit in Ohio for wrongful death, no matter where the cause of action may have arisen, even though the Legislature of Ohio has passed and has in continued effect the "borrowing" statute which provides expressly as follows:

> When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such action by the statute of such other state, territory, or foreign country. Ohio Revised Code § 2125.01.

To give effect to the panel's interpretation of Ohio law, is to in effect say that the Ohio Legislature intended to repeal the above quoted section of the Ohio law, even though the Ohio Legislature clearly did not do so.

A further troubling issue presented is whether an enforceable cause of action for wrongful death, properly filed and pending under Ohio law, may be destroyed by an act of the Legislature, subsequent to the filing of the claim in the Ohio Courts. It is suggested that such a

construction of the Ohio law gives violence to the express enactment of the "borrowing" statute, and further creates an *ex post facto* abolition of a claim lawfully established and pending in the Ohio courts.

For our United States Court of Appeals for the Fourth Circuit to construe the laws of Ohio as the panel in this case has done thus far, would be to interpret the laws of that State in such a way as to permit the Nisiotakis heirs to enter the courts of that State and establish a cause of action for wrongful death, and then determine that after they have done so, by inference, the Legislature has cut off their right to be heard and that they shall never have their day in court to determine the merits of their controversy against the Defendant Rockwell. Such a construction of the Ohio laws surely does violence to fundamental American concepts of due process and fair play, and we respectfully suggest may even amount to a deprivation of equal protection of the laws.

We thus most earnestly request and suggest reconsideration of this claim *in banc*, and an opportunity to further brief these important issues now presented by this case in its present posture.

Respectfully submitted.

March 13, 1986.

TOMS & BAZZLE, P.A.

By: /s/ James H. Toms
JAMES H. TOMS

By: /s/ Ervin W. Bazzle
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[Certificate Omitted in Printing]

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1006

VASILIKI NISIOTAKIS, *et al.*,
Appellants,

versus

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, ETC., *et al.*,
Appellees.

No. 85-1040

VASILIKI NISIOTAKIS, *et al.*,
Appellees,

versus

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, ETC., *et al.*,
Appellant,

and

STENCEL AERO ENGINEERING CORP., ETC.,
Defendant.

[Filed Apr. 1, 1986]

Appeals from the United States District Court
for the Western District of North Carolina, at Asheville
Woodrow W. Jones, District Judge

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Widener.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

A-C-84-294

VASILIKI NISIOTAKIS, *et al.*,
Plaintiffs,

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION and STENCEL AERO ENGINEERING CORPORATION, a subsidiary of TALLEY INDUSTRIES, INC.,
Defendants.

[Filed Dec. 17, 1984]

MEMORANDUM OF DECISION

Plaintiffs instituted this action in the Common Pleas Court of Franklin County, Ohio seeking to recover damages for the alleged wrongful death of Theodoros Nisiotakis, a citizen of Greece. The case was removed to the United States District Court for the Southern District of Ohio on December 3, 1981 upon petition of the Defendant Rockwell International Corporation (Rockwell). On June 27, 1984 District Judge Kinneary filed an opinion and order in which he concluded that the Court lacked in personam jurisdiction over the Defendant Sten-

cel Aero Engineering Corporation (Stencel). In his opinion Judge Kinneary stated that while he could not transfer the action to California as requested by Plaintiffs' motion, he would "favorably entertain a motion to transfer this action, pursuant to 28 U.S.C.A. § 1406(a), to some other forum where personal jurisdiction may exist." Plaintiffs thereafter filed a motion for change of venue and the action was transferred to this Court by order of Judge Kinneary entered July 31, 1984.

The matter is presently before the Court on Defendants' motions for summary judgment on grounds that the action is barred by the statute of limitations. The Court heard the motions in Asheville, North Carolina on November 16, 1984. After careful consideration of the file, briefs and arguments of counsel the Court now enters its findings and conclusions.

The deceased, Theodoros Nisiotakis, was a citizen of Greece and a pilot in the Greek armed forces. On July 8, 1977 he was piloting a T-2E jet aircraft near Calamata, Greece when the aircraft crashed resulting in his death. The aircraft was manufactured by Defendant Rockwell. Plaintiffs allege that Nisiotakis was able to eject from the aircraft prior to the crash but that the ejection seat malfunctioned and was therefore a contributing proximate cause of the decedent's death. The ejection seat which was installed in the T-2E aircraft the decedent was piloting had been designed and manufactured by the Defendant Stencel.

This action was filed on November 2, 1981. Service of process was promptly had on Defendant Rockwell. However, as to Defendant Stencel, summons was not issued until August 5, 1982. Defendent Stencel was served by certified mail at its offices in Asheville, North Carolina on August 9, 1982. It is therefore undisputed that service of process was not made on the Defendant Stencel until more than five years after the death of Theodoros Nisiotakis.

During the time this action was before the United States District Court for the Southern District of Ohio Defendant Rockwell moved for summary judgment on statute of limitations grounds. In ruling upon Rockwell's motion Judge Kinneary concluded that the Ohio courts would not apply Ohio's two year wrongful death statute of limitations, but would instead apply the five year Greek statute of limitations. Judge Kinneary held that the action was therefore timely filed as to the Defendant Rockwell under the Greek statute of limitations. Judge Kinneary subsequently denied Rockwell's motion for reconsideration.

It is indisputable that under the law of North Carolina this action would have been barred had the action been filed in this State on November 2, 1981. It is still the rule in North Carolina that a nonresident may not, pursuant to a foreign statute of limitations, be accorded more extensive rights in the courts than are North Carolina citizens. *Tieffenbrun v. Flannery*, 198 N.C. 397, 404, 151 S.E. 857 (1930). *See, also, Broadfoot v. Everett*, 270 N.C. 429, 431, 154 S.E.2d 522 (1967).

A threshold issue however is whether this Court is bound to apply the law of Ohio where this action was originally filed or whether the applicable law is the law of North Carolina. In a well-reasoned opinion the United States Court of Appeals for the Fifth Circuit in *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099 (5th Cir. 1981) held that "following a 28 U.S.C.A. § 1404(a) [or § 1406(a)] transfer from a district in which personal jurisdiction over the defendant could not be obtained, the transferee court must apply the choice of law rules of the state in which it sits, regardless of which party requested the transfer." 646 F.2d at 1110 and 1111. Likewise in *T-Birds, Inc. v. Thoroughbred Helicopter Service, Inc.*, 540 F.Supp. 548 (E.D.Ky. 1982), the Court held that where an action had been transferred from the Southern District of Ohio to the Eastern District of Kentucky

because of lack of personal jurisdiction over the defendants the court would apply Kentucky's one year statute of limitations rather than Ohio's two year statute of limitations.

Were the courts to apply the law of the transferor state where the transferor state lacked personal jurisdiction over the defendant the result would be to allow an outcome which could not have been achieved in the courts of the state where the action was filed. Plaintiffs would thus be encouraged to file stale claims in states having liberal limitations periods even though the defendant was not subject to that state's jurisdiction, knowing that the action could later be transferred to a federal court in a state where personal jurisdiction over the defendant could be obtained. *Van Dusen v. Barrack*, 376 U.S. 612, 638, 84 S.Ct. 805, 820, 11 L.Ed.2d 945 (1964) condemns the utilization of federal transfer rules for the purpose of achieving such results.

Moreover, the Court concludes, as did the Court of Appeals for the Third Circuit in *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 165 (3rd Cir. 1980), *rev'd on other grounds*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), that to permit the application of the transferor forum's choice of law to a defendant over which the transferor forum lacked jurisdiction would violate due process.

The Court therefore concludes that as to Defendant Stencel North Carolina law must provide the rules of decision. North Carolina law provides that actions for damages on account of the wrongful death of a person must be filed within two years of the date of death. N.C. Gen.Stat. § 1-53. This action was not filed within two years of the decedent's death and must therefore be dismissed as to Defendant Stencel.

The question of whether Defendant Rockwell is entitled to dismissal on the same grounds as Stencel presents a

more complicated issue. Unlike Stencel, Rockwell was subject to the jurisdiction of the Ohio courts. A question therefore arises as to whether Plaintiffs' claims against Rockwell must be decided in accordance with Ohio law. If, following the transfer of this action to this Court, the Court must apply Ohio law to Plaintiffs' claims against Rockwell the Court would be compelled to conclude, under the law of the case doctrine, that this action was timely brought as to the Defendant Rockwell.

Plaintiffs argue that to apply North Carolina law to this case would allow Rockwell to obtain a benefit from the transfer it would not have in Ohio and would be manifestly unjust. In *In re Cragar Industries, Inc.*, 706 F.2d 503 (5th Cir. 1983) the Court noted that following a transfer pursuant to 28 U.S.C.A. § 1404(a) from the Northern District of Mississippi to the Western District of Louisiana codefendant General Motors might enjoy a defense not previously available. Although the Court did not rule on merits of the General Motors' statute of limitations defense, it did opine that the plaintiff might have made a tactical error in his transfer request and implicitly concluded that if a tactical error was made that fact should in no manner influence consideration of the merits of a General Motors' defense.

The issue presently before the Court is the issue the Court did not address in *In re Cragar Industries, Inc.* That issue is whether the choice of law rules of the transferor or the transferee forum must be applied when the transferor court has jurisdiction over one of two or more defendants but lacks jurisdiction over one or more of the remaining defendants.

The most direct guidance the Court has located concerning this issue is the decision of the Court of Appeals for the Fifth Circuit in *Ellis v. Great Southwestern Corp.*, *supra*, the decision of the Court of Appeals for the Sixth Circuit in *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980), and the Supreme Court's decision in *Van*

Dusen, supra. In *Ellis* the Court held that "following a section 1406(a) transfer, regardless of which party requested the transfer or the purpose behind the transfer, the transferee court must apply the choice of law rules of the state in which it sits." 646 F.2d at 1110. *See also,* 623 F.2d at 472-73. In *Van Dusen* the Supreme Court concluded that, under the *Erie*[1] doctrine, a substantially different result should not be reached whether the case is heard in a federal court or in the courts of the state in which the action was filed. 376 U.S. at 638-39, 84 S.Ct. at 830. Both *Ellis* and *Martin* relied principally on *Van Dusen's* rationale that the results should be similar whether the action was heard in state or federal court.

In the instant case, assuming Judge Kinneary's interpretation of Ohio choice of law rules was correct, the Plaintiffs would not have been barred from prosecuting their claims against Rockwell in the courts of the State of Ohio. However they would not have been permitted to sue both Rockwell and Stencel in Ohio. Stencel's due process rights foreclosed any such action in Ohio. Thus the result in the courts of the State of Ohio would necessarily have been that the action could have proceeded as to Rockwell and all claims against Stencel would have been dismissed. In order to maintain their entire action intact the Plaintiffs are required to file suit in a state where personal jurisdiction can constitutionally be obtained over both Defendants. Both Defendants have sufficient contacts with North Carolina that subjecting them to the jurisdiction of this State does not violate due process.

Plaintiffs predictably availed themselves of Judge Kinneary's invitation to transfer this action in order that this action might continue as to both Defendants and so that Stencel would not be relieved from potential lia-

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[1] *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938).

bility. In so doing the Plaintiffs made a tactical error which offered a limitations defense not previously available to Rockwell. Were the Court writing on a clean slate it would be inclined to retransfer this action to Ohio. Although the Court is not bound by the decision in *In re Cragar Industries, Inc., supra,* it appears likely, based upon the logic of that decision, that a retransfer would constitute an abuse of discretion.

The Court therefore concludes that North Carolina choice of law rules must apply with respect to Rockwell as well as to Stencel. As previously discussed Plaintiffs' action is barred by the North Carolina statute of limitations. The motions of both Rockwell and Stencel should therefore be allowed.

A judgment in accordance with these findings and conclusions shall be entered simultaneously herewith.

This the 14th day of December, 1984.

/s/ Woodrow H. Jones
United States District Judge

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

A-C-84-294

VASILIKI NISIOTAKIS, *et al.*,
Plaintiffs,
v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION and STENCEL AERO ENGINEERING CORPORATION, a subsidiary of TALLEY INDUSTRIES, INC.,
Defendants.

[Filed Dec. 17, 1984]

JUDGMENT

THIS MATTER having come before the Court upon the Defendants' motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the issues having been determined as shown by a Memorandum of Decision entered simultaneously herewith;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Defendants' motions for summary judgment be and the same are hereby granted and this action is hereby dismissed with prejudice.

The Clerk is directed to send a copy of the Memorandum of Decision and this Judgment to the attorneys for the parties.

This the 14th day of December, 1984.

/s/ Woodrow H. Jones
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

C-2-81-1437

VASILIKI NISIOTAKIS, *et al.*, ETC.,
Plaintiffs

vs.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, *et al.*,
Defendants

[Filed Oct. 27, 1982]

ORDER

This matter is before the Court upon the motion of defendant Rockwell International Corporation (Rockwell) for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant seeks summary judgment on the ground that the statute limitations is a bar to the plaintiffs' claims.

This action for wrongful death is brought by certain dependents of the late Theodoros Nisiotakis, who was a pilot and officer in the Greek Air Force. Mr. Nisiotakis was killed in an airplane crash on July 8, 1977, somewhere near Calamata, Greece. At the time of the accident he was operating a Rockwell T-2E jet aircraft. He ejected himself from the aircraft before it crashed, but he fell to the earth and died. Defendant Rockwell ad-

mits that it designed and assembled the aircraft flown by Mr. Nisiotakis at the time of his death and also admits that it provided field engineering services in Greece with respect to that aircraft. The other defendant in this action, Stencel Aero Engineering Corporation, designed, manufactured, and supplied parts for the ejection system of the aircraft. The plaintiffs brought this wrongful death action against both defendants asserting several products liability theories. Suit was commenced on November 12, 1981 by the filing of a complaint with the Franklin County Court of Common Pleas. Subsequently, the action was removed to this Court on the motion of Rockwell on the basis of diversity of citizenship jurisdiction.

Rockwell first contends that the plaintiffs' cause of action is barred by Ohio Revised Code Section 2125.02 that provides a two year statute of limitations for certain wrongful death actions, as over four years have elapsed between the demise of the decedent and the filing of this lawsuit. The plaintiffs, on the other hand, contend that because Greece was the *locus delicti* of the accident, the five year statute of limitations provided by Article 937 of the Greek Civil Code is the applicable statute and that the plaintiffs' cause of action is therefore not barred. Rockwell also asserts that the action must be dismissed because it was not brought in the name of the real party in interest, the personal representative.

I. The Conflict of Laws Problem

In this diversity case the Court sits as an Ohio Court, and is bound to apply Ohio law. The Court must as a threshold matter of Ohio conflict of laws principles decide whether Ohio law or Greek law is controlling with respect to the relevant statute of limitations.

"The . . . long established rule in Ohio is that limitation provisions are remedial in nature and are there-

fore controlled by the law of the forum." *Howard* v. *Allen*, 30 Ohio St. 2d 130, 133 (1972). "Actions . . . accruing outside of this state, and . . . limited by the law of the place where they accrued . . . to longer periods than those specified in our statute are governed as to limitation by the Ohio Statute in like manner as causes of action accruing within the state." *Pinney* v. *Cummings*, 26 Ohio St. 46 (1875). "Statutes of limitation relate to remedy and are and must be governed by the law of the forum . . . A Court has the power to say when its doors shall be open, and also has the power to say when they shall be closed." *Kerper* v. *Wood*, 48 Ohio St. 613, 622 (1891).

Some cases suggest an apparent exception to this rule, and state that where the statute of limitations in the foreign state terminates the right rather than the remedy, the foreign statute is controlling. *E.g., see Maki* v. *George V. Cook Co.*, 124 F.2d 663, 665 (6th Cir. 1942). But the cases warrant application of this rule only where the foreign statute terminates the substantive right of action before the forum state's statute of limitations has run. Where the foreign state whose substantive law is being applied defines the substantive right of a party as to extinguish the right after a given lapse of time, the forum state by application of its own purely procedural statute of limitations cannot enlarge the duration of the substantive right. This rule merely restates the *lex loci delicti* rule that the law of the foreign state where the wrong occurred governs substantive rights. The Court notes that this approach is consistent with §§ 142-143 of the Restatement (2d) of the Conflict of Laws:

> "§ 143. Foreign Statute of Limitations Barring the Right
>
> An action will not be entertained in another state if it is barred in the state of the otherwise appli-

> cable law by a statute of limitations which bars the right and not merely the remedy."

Under the Restatement's approach, the law of the foreign state governs substantive rights, and the law of the forum state may terminate the remedy. *Cf. Kerper* v. *Wood, supra.* Thus, the Court must look to Ohio law to determine the appropriate statute of limitations.

II. The Relevant Statute of Limitations

Defendant Rockwell insists that Ohio Revised Code Section 2125.02 is the controlling statute of limitations. Rockwell correctly states that plaintiff's cause of action under Ohio law has expired. *See* Ohio Rev. Code Ann. § 2125.02 (Anderson 1981). However, the plaintiff's cause of action is brought under the Greek Wrongful Death Act and not the Ohio Act. Therefore, Section 2125.02 is not necessarily controlling. Section 2125.02 states in relevant part:

> *Except as otherwise provided by law,* every such action [for wrongful death] must be commenced within two years after the death of such deceased person. Ohio Rev. Code Ann. § 2125.02 (emphasis added).

However, Section 2125.02 does not apply in the instant case because the law clearly provides otherwise.

> "When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. *Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.*" Ohio Revised Code § 2125.01 (emphasis added).

Thus, Section 2125.01 requires that the Court look to the relevant statute of limitations applicable to wrongful

death actions under Greek law. Even though the Greek statute of limitations for wrongful death is purely procedural as Professor John Kozyris undoubtedly correctly states in his affidavit, Ohio law mandates the application of the Greek statute.[1] The Greek statute applicable to wrongful death actions provides that

> "[a] tort claim is barred at the end of five years from the time that the victim learned of the damage and of the person obligated to make reparations; in any event, the claim is barred after the lapse of twenty years since the act occurred." Article 937 Civil Code of Greece (current text, translation by Professor John Kozyris, Professor of Law, Ohio State University College of Law).

The defendant does not contend nor can it seriously argue that this five years statute of limitations if applicable would not allow the plaintiffs to maintain their cause of action. Rockwell's own expert in Greek law, Professor Kozyris, admitted in his affidavit concerning Greek law that Greek Civil Code Article 937 applies to wrongful death actions. The Court must therefore con-

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[1] The Court notes that neither of the two parties that briefed this issue brought this matter to the attention of the Court. However, in its memorandum in support of its motion for summary judgment, defendant Rockwell stated, quoting a sentence from Section 2125.01 of the Ohio Revised Code:

> "When death is caused by a wrongful act, neglect or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state."

Nevertheless, Rockwell's counsel mentions nowhere in its argument or memorandum the very next sentence of the statute that states:

> "Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country." Ohio Rev. Code Ann. § 2125.01.

clude that the plaintiffs' cause of action is not barred by the statute of limitations.

IV. The Real Party in Interest

The defendant also seeks dismissal of the action on the ground that it was not brought in the name of the real party in interest. Under Ohio law, the "personal representative" is considered to be the real party in interest in an action for wrongful death. Ohio Rev. Code Ann. § 2125.02. The plaintiffs who are allegedly the beneficiaries under the Greek wrongful death statute have failed to bring the action in the name of the personal representative of the deceased. Thus, they have not brought the action in the name of the real party in interest. *Cf.* Rule 17(a), Federal Rules of Civil Procedure.

Nevertheless, neither dismissal of the action nor summary judgment in favor of the defendants are appropriate remedies for failure to bring on action in the name of the real party in interest.[1] Under Rule 17 of the Federal Rules of Civil Procedure,

> no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Accordingly, the Court must allow a reasonable time for the joinder or substitution of the personal representation of the decedent. Disimssal of the action is clearly

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[1] This rule of law, as the Court shall subsequently demonstrate is not merely relevant to the issues before the Court, but is entirely dispositive of the issues. Why the parties failed to bring this matter to the attention of the Court is most perplexing.

unwarranted at this juncture in the proceedings. *Id. See* 3A Moore's Federal Practice ¶ 17.151 (1981). If an executor or administrator of the estate of Theodoros Nisiotakis has been appointed under the laws of Greece, then he may be properly joined or substituted as a party plaintiff in this action, as Ohio Revised Code Section 2113.75 provides that an action may be brought in the courts of this state by an executor or administrator appointed by the laws of a foreign country. *See* 30 Ohio Jur. 3d *Death* § 124.

On the other hand, if no executor or administrator has been appointed in Ohio, then the courts of this state have the power to appoint an ancillary administrator to administrator the decedent's Ohio assets. Ohio Rev. Code Ann. § 2129.04. Ancillary administration of the estate may be had upon the application of any interested person in any county in Ohio in which is located property of the decedent. *Id.* "An action for wrongful death is an asset of the decedent's estate and is, therefore, sufficient to justify the appointment of an administrator or ancillary administrator in this state, even though there existed no other necessity for such an appointment, and the deceased was not domiciled in the state, and left no property [other than the action for wrongful death] in this state." *De Garza* v. *Chetister*, 62 Ohio App. 2d 149 (Lucas County App. 1978). Thus, an ancillary administrator may be appointed to administrate the decedent's Ohio assets, including the asset that is an action for wrongful death. Once the probate court having jurisdiction over the matter appoints an administrator, he or she could be joined or substituted in this action.

The Court determines that a period of ninety (90) days is a reasonable time for the plaintiffs to obtain the ratification of the action by, or joinder or substitution of, the real party in interest, this period being subject, of course, to such extensions of time as the Court may deem necessary to advance the cause of justice. If the

plaintiffs fail to comply with Rule 17(a) of the Federal Rules of Civil Procedure within the time herein allotted, then the Court *sua sponte* shall dismiss the action without prejudice.

WHEREUPON, being fully advised and in consideration of all relevant facts and issues, the Court determines that the motion of defendant Rockwell International Corporation for summary judgment is without merit, and the motion is therefore DENIED. The plaintiffs are hereby ORDERED to cause the joinder or substitution of, or ratification of the action by, the real party in interest within ninety days of the issuance of this Order or such later date as the Court may further order.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

C-2-81-1437

VASILIKI NISIOTAKIS, *et al.*,
Plaintiffs,

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, *et al.*,
Defendants.

OPINION AND ORDER

This matter is before the Court upon the motion of defendant Rockwell International Corporation (Rockwell) for reconsideration of its motion for summary judgment which the Court denied on October 27, 1982. In the alternative, Rockwell requests the Court to certify the case for interlocutory appeal pursuant to the provisions of 28 U.S.C. § 1292(b).

The facts relevant to the defendant's motion for summary judgment are fully set forth in the Court's Opinion and Order of October 27, 1982, and they need not be repeated here. The plaintiffs brought this action to enforce the Greek wrongful death statute pursuant to Ohio Revised Code Section 2125.01 which authorizes the bringing of this suit in an Ohio court. The legal issue presented by Rockwell's summary judgment motion is whether the plaintiffs' cause of action is governed by the five-year Greek statute of limitations applicable to such actions, or rather by the two-year statute provided by the

Ohio Wrongful Death Act. Ohio Rev. Code § 2125.02. If the Ohio statute applies, the plaintiffs' remedy is barred. If the Greek statute applies, the right of action remains enforceable.

In its Opinion and Order of October 27, 1982, the Court held that the Greek statute is controlling and the Court therefore denied Rockwell's motion for summary judgment. It is this decision that Rockwell seeks the Court to reconsider.

The Court is of the opinion that reconsideration of the defendant's motion is clearly precluded by the decision of the Supreme Court of Ohio in *Fox v. Morrison Motor Freight, Inc.*, 54 Ohio Ops. 2d 301, 304-305 (1971) (Duncan, J.). There the Court stated that:

> The simple meaning of [Ohio Revised Code] . . . 2125.01 is that *a right to sue* for an alleged wrongful death occurring in another state *may be enforced* in the courts of Ohio. While *the General Assembly did, in effect, incorporate the statute of limitations of the* situs *state*; its failure to specifically require any further application of foreign law supports our conclusion that there is no intended requirement that the entire Illinois statute be utilized . . . (emphasis changed).

Thus, the Ohio Supreme Court holds that where an action is brought in Ohio under Ohio Revised Code § 2125.01 to enforce the wrongful death statute of a foreign *situs*, the Court must apply the statute of limitations of that *situs*.[1] *Fox, supra*, at 304. In its Opinion and Order of

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[1] Ohio Revised Code § 2125.01 provides in part:

> Every such action [brought under the statute of a foreign state, territory, or country] shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.

The Supreme Court of Ohio in *Fox, supra*, 54 Ohio Ops. 2d at 304, stated in unambiguous terms that this provision is intended to

October 27, 1982, the Court reached precisely this conclusion, and it thus correctly held that because the action was brought within the time allowed under the Greek statute of limitations, the action was not barred. Accordingly, reconsideration of the Court's decision on Rockwell's summary judgment motion is foreclosed.

WHEREUPON, the Court determines that the motion of defendant Rockwell International Corporation for reconsideration of its summary judgment motion is without merit, and the motion is therefore DENIED. The defendant's request for certification for interlocutory appeal pursuant to 28 U.S.C. § 1202(b) is contrary to the interests of justice, and the request is therefore DENIED.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
United States District Judge

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incorporate the statute of limitations of the *situs*. Thus, the Ohio Supreme Court reads section 2125.01 in the same common sense manner as does this Court.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

C-2-81-1437

VASILIKI NISIOTAKIS, *et al.*,
Plaintiffs

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, *et al.*,
Defendants

[Filed June 27, 1984]

OPINION AND ORDER

This matter is currently before the Court on a motion to dismiss or, in the alternative, for summary judgment filed by the defendant, Stencel Aero Engineering Corporation. Defendant's motion to dismiss is predicated upon its belief that this Court lacks personal jurisdiction with respect to defendant. Defendant's motion for summary judgment is predicated upon its belief that this action, as it relates to defendant, is time-barred by the applicable statute of limitations. Plaintiffs in this action are seeking to recover monetary relief from the defendants, The Columbus Division of Rockwell International Corp. and Stencel Aero Engineering Corp., for the death,

allegedly caused by the defendants, of Theodoros Nisiotakis.[1]

RELEVANT FACTS

Stencel Aero Engineering Corp. (hereinafter "Stencel") is a corporation organized and existing under the laws of North Carolina. It is a manufacturer of component parts used in aircrafts which contain an ejection escape system. Its only facilities are located in Asheville, North Carolina and Hurricane Mesa, Utah. Its products are designed and manufactured solely at its North Carolina facility. The facility in Utah is used solely for the purpose of testing its products.

Stencel's work is done pursuant to contracts entered into with the United States Defense Department. The resulting products are delivered to the United States Military at the North Carolina plant. The Military is then responsible for the later incorporation of Stencel's component parts into Military aircraft. In the context of this case, it is apparent that the Military delivered Stencel's ejection escape system to the defendant, The Columbus Aircraft Division of Rockwell International Corp. (hereinafter "Rockwell"), for incorporation into Rockwell's airplanes, specifically an airplane known as the T-2E.

The deceased, Theodoras Nisiotakis, was a citizen of Greece and a member of the Greek military. It is alleged, by the plaintiffs, that Nisiotakis, on July 8, 1977, was piloting a Rockwell T-2E airplane near Calamata, Greece when the aircraft crashed causing his death. Plaintiffs further alleged that the resulting death was caused by the manufacturing and design defects of the T-2E. With respect to Stencel, plaintiffs specifically al-

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[1] The facts relevant to the issues which this Court must consider herein are not substantially in dispute. Therefore, the Court need not conduct an evidentiary hearing. *Welsh v. Gibbs*, 631 F.2d 436 (6th Cir. 1980).

lege that the T-2E's ejection system, allegedly manufactured by Stencel, malfunctioned because of a manufacturing and/or design defect and was, therefore, at least partially the proximate cause of Nisiotakis' death.

Plaintiffs' cause of action arose on July 8, 1977, the date upon which the aircraft Nisiotakis was piloting crashed causing his death. This action was filed on November 2, 1981 in the Common Pleas Court of Franklin County, Ohio. It was subsequently removed, upon the request of the defendant Rockwell, to this Court on December 3, 1981. Plaintiffs served Stencel with a copy of the Complaint in this case on August 9, 1982.

DISCUSSION

The Court will initially discuss Stencel's motion to dismiss. That motion is predicated upon Stencel's belief that this Court lacks personal jurisdiction. A ruling in favor of Stencel, with respect to this motion, will eliminate the need for this court to consider Stencel's alternative motion for summary judgment.

I.

The law governing personal jurisdiction is, although difficult to apply, well established. It is clear that Ohio's long-arm statute, Ohio Rev. Code Ann. § 2307.382, permits the exercise of personal jurisdiction to the limits allowed by due process. In order to subject a defendant to the personal jurisdiction of the Court, due process requires that there exist certain "minimum contacts" with the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In considering Ohio's requirements for invoking its jurisdiction over a nonresident defendant, pursuant to § 2307.382, the Ohio courts have formulated the following three-part test:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. (citations omitted).

Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir. 1968). In order to determine whether plaintiffs have met their burden under the rule enunciated herein, the Court must closely evaluate the particular facts of this case.

The only contact which Stencel has with the State of Ohio is that certain parts manufactured at its plant in North Carolina were installed in airplanes manufactured in Ohio by defendant Rockwell. There is no evidence that Stencel is authorized to do business in Ohio or that it solicits business in Ohio. Further, there is no evidence that employees of Stencel have ever travelled to Ohio for the purpose of soliciting or carrying on business. Nor does the record indicate that Stencel regularly, or even occasionally, sells its products directly to Ohio customers. Aside from the incorporation of Stencel's component parts into Rockwell's airplanes, there is no evidence to suggest that Stencel has any contacts with Ohio.

Stencel's contact with the State of Ohio, through Rockwell, is made even more tenuous in that the parts ultimately used by Rockwell were not directly purchased from Stencel. Rather, such parts were received by Rockwell from the United States Military. It was the Military that purchased such parts from Stencel and those purchases were made in North Carolina. Nonetheless, plaintiffs contend that Stencel is subject to the personal jurisdiction of this Court, pursuant to § 2307.382(A)

(1), because it is, and has been, ". . . transacting . . . business in this state." [2]

Plaintiffs, to a considerable degree, rely upon *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E. 2d 761 (1961), and its progeny for their argument that Stencel, because it should reasonably have foreseen that its products would travel to Ohio, was "... transacting . . . business in this state." *Gray* and its progeny, however, are distinguishable in one very important respect. In all of those cases, the tortious injury of which the plaintiff or plaintiffs complained occurred in the state in which the suit was brought. Here, however, the tortious injury of which plaintiffs complain occurred in Greece.[3] In *Gray*, the Court stated:

> As a general proposition, if a corporation elects to to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.

176 N.E.2d at 766. In this case, the product at issue was not "ultimately used" in Ohio. Rather, it was "ultimately used" in Greece.

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[2] It is clear that the only plausible subsection of § 2307.382(A) under which plaintiffs may argue that personal jurisdiction exists is subsection (1). Subsections (3), (4) and (5), the alternative subsections under which plaintiffs argue that personal jurisdiction exists with respect to Stencel, require that the "tortious injury" have occurred in Ohio. *Busch v. Service Plastics, Inc.*, 261 F.Supp. 136 (N.D. Ohio 1966). The tortious injury of which the plaintiffs complain herein clearly did not occur in Ohio. In *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), the court stated:

> It is well established . . . that in law the place of a wrong is where the last event takes place which is necessary to render the actor liable. Restatement of Conflict of Laws, sec. 77.

Id. at 762. In this case, the place of the wrong was, and, therefore, the tortious injury occurred in, Greece. It was in Greece where the crash giving rise to potential liability occurred.

[3] *See* note 2, supra.

The importance of the distinction between this case and *Gray* and its progeny underscores the weight courts give, with respect to the issue of personal jurisdiction, to the forum state's interests in maintaining jurisdiction over a foreign corporation. If a foreign corporation has, through its business contacts with the forum state, availed itself of the laws of that state, or if a product manufactured by such a corporation injured a resident of the forum state, or merely injured a person present in the forum state, the forum state's interest in resolving the subsequent controversy is obvious. In this case, however, it is difficult to speculate in what manner the Ohio courts would be at all interested in resolving the existing dispute between plaintiffs and Stencel. The products manufactured by Stencel were never used by a consumer in this state. Nor would such use have been reasonably foreseeable by Stencel. Neither did Stencel seek to avail itself of the protections and benefits of Ohio law. For example, Stencel could not sue Rockwell for nonpayment of a debt arising with respect to the products at issue. Stencel was presumably paid in full by the United States Military.

The Court, in its consideration of the issue herein presented, must hold that it does not have personal jurisdiction over defendant Stencel. The contacts which Stencel has, or has had, with the State of Ohio, if such can be appropriately termed contacts, are not sufficient to meet the three-part test delineated in *Southern Machine Co. v. Mohasco Industries, Inc.*, supra, or, for that matter, the strict requirements of due process. With respect to the first part of the *Southern Machine* test, it is fairly clear that Stencel did not ". . . purposefully avail [itself] of the privilege of acting in the forum state or causing a consequence in the forum state." Stencel did not derive income from customers of its products in Ohio. Rather, Stencel derived its income from the United States Military. While it may be ar-

gued that Stencel indirectly derived income from goods from Stencel if such goods were not to be used in Rockwell aircraft manufactured in Ohio, such is, in the Court's opinion, insufficient to confer personal jurisdiction over Stencel. The type of impact to which the court in *Southern Machine* refers is of a considerably greater magnitude than that which is present here.

If the Court were to take plaintiffs' foreseeability theory to its logical conclusion, Stencel would be amenable to suit in every state or country in which the United States Military delivered Stencel products for incorporation into military machinery. This Court is not inclined to adopt the notion that a product sold by the manufacturer or seller of such product is, in effect, the agent of such manufacturer or seller for purposes of service of process. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980). It is the Court's opinion, therefore, that plaintiffs have failed to show, to the requisite degree, that defendant Stencel has, or has had, sufficient contacts with the State of Ohio to make it amenable to suit in the Courts of Ohio. Plaintiffs are required, with respect to issue of personal jurisdiction,

> . . . to make a prima facie case of jurisdiction, that is [they] need only "demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss."

631 F.2d 436, 438 (6th Cir. 1980). Plaintiffs have failed to sustain their burden. In the language of Ohio Rev. Code Ann. § 2307.382(A)(1), plaintiffs have failed to show that Stencel was ,and is, ". . . transacting any business in this state."

II.

The Court, because of its findings herein, need not consider Stencel's alternative motion for summary judgment. It must, however, consider plaintiff's motion to transfer

this action back to California. This action had initially been filed in California. However, it was determined by the Superior Court of California that California was not a convenient forum for the adjudication of this case. In light of this finding, the Court cannot consent to send this action, as it relates to defendant Stencel, back to California. The Court would, however, favorably entertain a motion to transfer this action, pursuant to 28 U.S.C. § 1406(a), to some other forum where personal jurisdiction may exist.

WHEREUPON, the Court shall refrain from ruling upon the motions discussed herein until such time as plaintiffs have had an opportunity to request a transfer of this action to an appropriate forum.

Plaintiffs are hereby given leave to file a motion for change of venue, pursuant to 28 U.S.C. § 1406, within 30 days from the date of this order.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

C-2-81-1437

VASILIKI NISIOTAKIS, *et al.*,
Plaintiffs,

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, *et al.*,
Defendants.

[Filed July 2, 1984]

ORDER

This matter is currently before the Court on the motion of plaintiffs, Vasiliki Nisiotakis, *et al.*, for change of venue. Specifically, plaintiff's request, in the interests of justice, that this action be transferred to the United States District Court, Western District of North Carolina, Asheville Division. Upon consideration and being duly advised, the Court determines plaintiffs' motion to be meritorious and it is, therefore, GRANTED. This action, in its entirety, is hereby transferred to the United States District Court, Western District of North Carolina, Asheville Division.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
United States District Judge

No. 85-2151

JUL 31 [illegible]

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VASILIKI NISIOTAKIS, CONSTANDINOS NISIOTAKIS, and STELLA NISIOTAKIS, individually; CHRISTOS NISIOTAKIS, a minor, and KOSTAS NISIOTAKIS, a minor, by and through their Guardian ad Litem, EUGENE J. MARSHALL; as heirs of THEODOROS NISIOTAKIS, deceased,

Petitioners,

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, a corporation
and

STENCEL AERO ENGINEERING CORPORATION, a subsidiary of TALLEY INDUSTRIES, INC., a corporation

Respondents.

BRIEF BY RESPONDENT ROCKWELL INTERNATIONAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONDENT'S RULE 28.1 STATEMENT

Current Subsidiaries and Affiliates of Rockwell International Corporation

A.J. Sage and Co., Pty. Limited (Australia)
Amforge, Inc. (Illinois)
Arpel, S.A. (France)
Atomics International, Inc. (Delaware)
Audco-Rockwell Italiana S.R.L. (Italy)
Automotive Axles Limited (India)
Autonetics, S.A. (Mexico)
Autonetics, Inc. (Delaware)

Braseixos S/A (Brazil)
Brasprenas S/A (Brazil)

Camden Investment Trust, Limited (England)
Collins International Service Company (Texas)
Collins Radio Company (Iowa)
Collins Radio Company of Japan, Ltd. (Japan)
Collins Radio Constructors, Inc. (Texas)
Collins Systems International Inc. (Delaware)
Compagnie Industrielle de Mecanismes, S.A. (France)
Componentes Automotrices Rockwell-Standard y Compania Limitada (Chile)
Constantine Insurance Company, Ltd. (Bermuda)

Dina Rockwell Nacional S.A. (Mexico)
Draper Americas, Inc. (Massachusetts)

Electronic Fabriek N.V. (The Netherlands Antilles)
Europlastique S.A. (France)

Flexible, Inc. (Delaware)

Hills-McCanna Company (Delaware)

Ikegai-Goss Co. Ltd. (Japan)
Industrias Erlo, S.A. de C.V. (Mexico)
Industrias Teluq, S.A. (Spain)

Maine Electronics, Inc. (Delaware)
Manufacturers Leasing Associates XXXV (Maryland)
Metalurgica Carabobo, S.A. ("Metalcar") (Venezuela)
MGD Graphic Systems, Inc. (Switzerland)
Moligal Produtors de Assentos de Automovel, Limitada (Portugal)
M.P. O'Rourke Pty., Limited (Australia)

Narland Corporation (Delaware)
North American Aviation, Inc. (Delaware)
North American Rockwell Corporation (Delaware)
Nuad Corporation (Delaware)

PHI Magnetronics Limited (England)
Press Kogyo-Rockwell Co., Ltd. (Japan)

Recticon Corporation (Delaware)
Rocketdyne Corporation (Washington, D.C.)
Rocketdyne, Inc. (Delaware)
Rockitt, Ltd. (Oklahoma)
Rockwell Aerospace & Electronics, Inc. (Delaware)
Rockwell (Bermuda) Ltd. (Bermuda)
Rockwell Cerdans, S.A. (Spain)
Rockwell-Collins (Australasia) Pty. Ltd. (Australia)
Rockwell-Collins (Far East) Limited (Hong Kong)
Rockwell-Collins (U.K.) Limited (England)
Rockwell-Collins de Mexico, S.A. (Mexico)
Rockwell-Collins de Nogales, S.A. (Mexico)
Rockwell-Collins France S.A. (France)
Rockwell-Collins G.m.b.H. (Fed. Rep. of Germany)
Rockwell-Collins International, Inc. (Texas)
Rockwell-Collins Italiana S.p.A. (Italy)
Rockwell CVC OMEVI S.p.A.
Rockwell do Brasil Industria e Comercio Ltda. (Brazil)
Rockwell Financial Services Corporation (Delaware)
Rockwell Golde G.m.b.H. (Fed. Rep. of Germany)

Rockwell Golde Italiana S.p.A. (Italy)
Rockwell Graphic Systems Limited (England)
Rockwell Graphic Systems, Inc. (Delaware)
Rockwell International Corporation (Nevada)
Rockwell International Credit Corporation (Delaware)
Rockwell International Finance Corporation (Delaware)
Rockwell International G.m.b.H. (Germany)
Rockwell International Holdings Limited (Delaware)
Rockwell International Limited (England)
Rockwell International Manufacturing Pre. Ltd. (Delaware)
Rockwell International of Canada Ltd. (Canada)
Rockwell International Operations, Inc. (Delaware)
Rockwell International Overseas Capital Corporation (Delaware)
Rockwell International Overseas Corporation (Delaware)
Rockwell International Pension Trustees Limited (England)
Rockwell International S.A. (France)
Rockwell International S.A. (Switzerland)
Rockwell International Sales Corporation (Delaware)
Rockwell International Services Limited (England)
Rockwell International Systems, Inc. (Delaware)
Rockwell International Taiwan Company, Ltd. (China)
Rockwell International Trading Company (Delaware)
Rockwell International Ventures, Inc.
Rockwell Limited (Delaware)
Rockwell Manufacturing Company (Delaware)
Rockwell-Maudslay Limited (England)
Rockwell Mexicana, S.A. (Mexico)
Rockwell-Rimoldi da Amazonia, Industria e Comercio Limitada (Brazil)
Rockwell Rimoldi Espanola S.A. (Spain)
Rockwell Rimoldi France S.A. (France)
Rockwell-Rimoldi G.m.b.H. (Germany)
Rockwell-Rimoldi (Great Britain) Limited (England)

Rockwell-Rimoldi (Ireland) Ltd. (Ireland)
Rockwell-Rimoldi of America, Inc. (New York)
Rockwell-Rimoldi S.p.A. (Italy)
Rockwell Shuttle Operations, Inc.
Rockwell-Standard Corporation (Nevada)
Rockwell-Standard de Venezuela C.A. (Venezuela)
Rockwell Standard of Australia Limited (Australia)
Rockwell Systems Graphiques, S.A. (France)
Rockwell Thompson Limited (England)
Rockwell Transmission Company (Delaware)
Rockwell U.K. Limited (England)
Rockwell Valves International, Inc. (Delaware)
Rockwell Valves Limited (England)
Rockwell Valves S.A. (France)
Rockwell Walther Australia Pty. Ltd. (Australia)
Rockwell Western Trade Corporation (Delaware)
R.O.R. - Sevem S.A. (France)
Rubery Owen-Rockwell (Europa) B.V. (The Netherlands)
Rubery Owen-Rockwell (Manufacturing) Limited (England)
Rubery Owen-Rockwell Limited (England)
Ruedas de Venezuela S.A. (Venezuela)

Sapart, A.G. (Liechtenstein)
Saseb Ag Eschen (Liechtenstein)
SCI Aux Pres Renard (France)
S.C.I. Volta (France)
S.C.I. de Sully sur Loire (France)
Serrature Auto Ferroviarie Edili SpA. (Italy)
Serrature Auto Meridionali Stampi Attrezzature SpA. (Italy)
Setec S.p.A. (Italy)
Silvant Plastics Limited (England)
Smith-Blair Inc. (Ohio)
Societe d'Execution Rationelle de Mecanique Automobile S.a.r.L. (France)
Sumlock Anita Services Limited (England)

Taiwan Axle Company Limited (Republic of China)
Tamet Compania Anonima (Venezuela)
Truflo G.m.b.H. (Germany)
Tyseley Estates Limited (England)

USHA Telehoist, Limited (India)

W.B. Bumpers Limited (England)
Wescom-Alco Associates (Illinois)
Wescom, Inc. (Illinois)
Wescom Leasing Corporation (Delaware)
Wescom (U.K.) Limited (United Kingdom)
Western INternational Industries (California)
Wilmot Breeden Australia Nominees Pty. Ltd. (Australia)
Wilmot Breeden (Australia) Pty Limited (Australia)
Wilmot Breeden Continental, S.A. (Switzerland)
Wilmot Breeden Employees Trust Limited (England)
Wilmot Breeden Group Properties Limited (England)
Wilmot Breeden (Holdings) Limited (England)
Wilmot Breeden International, Inc. (Michigan)
Wilmot Breeden Limited (England)
Wilmot Breeden (Pressings) Limited (England)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-2151

VASILIKI NISIOTAKIS, CONSTANDINOS NISIOTAKIS, and STELLA NISIOTAKIS, individually; CHRISTOS NISIOTAKIS, a minor, and KOSTAS NISIOTAKIS, a minor, by and through their Guardian ad Litem, EUGENE J. MARSHALL; as heirs of THEODOROS NISIOTAKIS, deceased,

Petitioners,

v.

THE COLUMBUS AIRCRAFT DIVISION OF ROCKWELL INTERNATIONAL CORPORATION, a corporation

and

STENCEL AERO ENGINEERING CORPORATION, a subsidiary of TALLEY INDUSTRIES, INC., a corporation,

Respondents.

BRIEF BY RESPONDENT ROCKWELL INTERNATIONAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

Respondent incorporates the "OPINIONS BELOW" contained in Petitioner's brief and cites to those opinions in like manner.

OBJECTION TO JURISDICTION

28 U.S.C. § 2101(c) allows ninety (90) days after the entry of judgment or decree to apply for a writ of certiorari. The United States Court of Appeals for the Fourth Circuit on February 27, 1986 issued its decision affirming the granting of summary judgment in favor of Defendant Rockwell International Corporation, (App. A, pp. 1a-10a), and the ninety (90) days from this final decision had long since expired prior to June 30, 1986, when the petition for writ of certiorari was filed.

Petitioners filing a "suggestion" for hearing *in banc* to the United States Court of Appeals for the Fourth Circuit (App. B, pp. 11a-14a) did not affect the finality of the earlier decision nor did it toll the running of the ninety (90) day limitation. Rule 35(c), Federal Rules of Appellate Procedure.[1]

Based upon the foregoing, Respondent objects to jurisdiction on the grounds the petition for writ of certiorari was untimely. 28 U.S.C. § 2101(c).

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[1] On page 2 of their brief to this Court, Petitioners acknowledge under "JURISDICTION" that they filed on March 14, 1986 a "suggestion for hearing *in banc* to the United States Court of Appeals for the Fourth Circuit." Furthermore, the title of the pleading filed on said date makes it evident they were filing a suggestion for a hearing *in banc*, as opposed to a petition for rehearing. The title of the March 14, 1986 pleading read, "Petition Suggesting Hearing by the Court of Appeals In Banc under FRAP 35." (App. B, p. 11a). Rule 35(c), Federal Rules of Appellate Procedure, states in pertinent part as follows,

> "The pendency of such a suggestion whether or not included in a petition for rehearing *shall not affect the finality of the judgment of the Court of Appeals or stay the issuance of a mandate.*" (Emphasis supplied).

STATUTES INVOLVED

Respondent incorporates the statutes cited and quoted in Petitioner's brief, in addition to the following statutes:

28 U.S.C. § 1291 states as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(b) states as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1406(a) states as follows:

> (a) The district court of a district in which is filed a case laying venue in the wrong division

> or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 2101(c) states as follows:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

Plaintiffs/Petitioners in this action sought to recover damages for the alleged wrongful death of Theodoros Nisiotakis who was killed in an airplane accident near Calamata, Greece on July 8, 1977.

The action was originally filed in the Superior Court of the State of California on August 29, 1978. On November 2, 1981, Plaintiffs filed a separate suit in the Common Pleas Court of Franklin County, Ohio, and the action was later removed to the United States District Court for the Southern District of Ohio upon the petition of Defendant Rockwell International Corporation (hereinafter "Rockwell"). Also named as a Defendant in the Ohio suit was Stencel Aero Engineering Corporation (hereinafter "Stencel").

On May 12, 1982 Defendant Rockwell filed a motion for summary judgment on the grounds the action was barred by the Ohio two-year statute of limitations for wrongful death. On October 27, 1982 the Honorable

Joseph D. Kinneary entered an Opinion and Order denying Rockwell's Motion for Summary Judgment. (App. E, pp. 25a-32a). Judge Kinneary found that under Ohio choice of law rules the five-year Greek statute of limitations applied, and under the Greek statute the action was not time-barred as to Rockwell.

On December 1, 1982 Rockwell moved the district court to reconsider its denying Rockwell's Motion for Summary Judgment, or, in the alternative, that the Court certify the issues to the Sixth Circuit pursuant to 28 U.S.C. § 1292(b). After Plaintiffs filed a memorandum contra opposing these motions, including the motion to certify, on April 6, 1983 Judge Kinneary denied both the motion to reconsider and the motion to certify. (App. F, pp. 33a-35a).

On June 20, 1983 Stencel filed a Motion to Dismiss the action as to that defendant for lack of personal jurisdiction. On June 27, 1984 Judge Kinneary entered an Opinion and Order refraining from ruling upon Stencel's Motion to Dismiss until such time as Plaintiffs had an opportunity to request a transfer of the action pursuant to 28 U.S.C. § 1406(a) to some other forum where personal jurisdiction over Stencel may exist. (App. G, pp. 36a-43a, at pp. 42a-43a). On July 27, 1984 Plaintiffs voluntarily sought the removal of the entire action to the United States District Court, Western District of North Carolina, Asheville Division, and by Order dated July 31, 1984 Judge Kinneary granted the motion. (App. H, p. 44a).

On November 6, 1984 Rockwell moved for summary judgment on the grounds North Carolina law now governed and the action was barred by the two-year North Carolina statute of limitations. On November 9, 1984 Stencel filed a Motion for Judgment on the

Pleadings for lack of personal jurisdiction, lack of subject matter jurisdiction, insufficiency of process and service of process, failure to state a claim upon which relief may be granted, and a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the grounds the claim was barred by the North Carolina statute of limitations. On December 17, 1984 the Honorable Woodrow W. Jones issued his Judgment and Memorandum of Decision granting Defendants' motions for summary judgment and dismissed the action against Defendant Rockwell and Defendant Stencel with prejudice. (App. D, pp. 17a-23a).

Plaintiffs subsequently appealed Judge Jones' dismissal to the United States Court of Appeals for the Fourth Circuit. Because Rockwell had earlier been prevented from having the case reviewed by the Sixth Circuit following Judge Kinneary denying its original Motion for Summary Judgment, and because Judge Jones' decision represented a final decision as opposed to being interlocutory, Rockwell asserted in a cross-appeal and in further support of Judge Jones' dismissal, the original error by Judge Kinneary.[2]

On February 27, 1986 the Fourth Circuit affirmed Judge Jones' decision dismissing both Defendants Rockwell and Stencel. (App. A, pp. 1a-10a). The decision with respect to Rockwell was predicated upon

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[2] Judge Jones' decision assumed for sake of argument that there was a conflict between the Ohio and North Carolina laws for the commencement of a wrongful death suit and North Carolina governed. The cross-appeal asserted, in further support of the dismissal, there was no conflict, for Ohio also required all wrongful death lawsuits to be commenced within two years.

Ohio Supreme Court decisions and the mandate from the legislature of Ohio, all ignored by Judge Kinneary, requiring all wrongful death actions commenced in Ohio be filed within two years of the decedent's death.[3]

On March 14, 1986 Plaintiffs filed a "Petition Suggesting Hearing by the Court of Appeals *In Banc* Under FRAP 35." (App. B, pp. 11a-14a). The suggestion was denied on April 1, 1986, and Plaintiffs filed their Petition for a Writ of Certiorari on June 30, 1986.

ARGUMENT

I. Summary

The decision denying summary judgment by the United States District Court sitting in Ohio constituted a significant departure from established Ohio law and the decisions from the highest court for the State of Ohio. When Petitioner transferred the entire case from Ohio to North Carolina, the transferor court lost all jurisdiction, and the transferee court inherited

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[3] There is no dispute that the claim was filed in Ohio on November 2, 1981 more than four years after the death of decedent, Theodoros Nisiotakis. There is also no dispute that North Carolina law required the action be filed in North Carolina within two years from the date of death. By holding Ohio also required the action to be filed within two years from the date of death, there existed no conflict of law between the State of Ohio and the State of North Carolina, thus necessitating that the Fourth Circuit affirm Judge Jones' dismissal on the basis the commencement of the suit was untimely. The absence of a conflict between the laws of the two states made it unnecessary for the Fourth Circuit in its opinion to address the issue of whether Ohio law or North Carolina should govern following the transfer to North Carolina.

all orders of the transferor court, as if the action had been commenced in North Carolina and as if the North Carolina court had made the earlier decisions and orders. *Magnetic Engineering & Manufacturing Co. v. Dings Mfg. Co., infra*; and, *In Re Miller, infra.*

All interlocutory decisions became ripe for appeal upon the North Carolina District Court rendering a final decision when it granted Respondent's Motion for Summary Judgment and dismissed with prejudice all claims against Rockwell. The issues addressed in the cross-appeal were then properly before the Fourth Circuit in further support of the North Carolina District Court's decision.

Petitioners cannot, as they now advocate in their brief to this Court, seek and obtain the transfer of a case from one state to another and thereby bar Respondent's right to have a lower court's erroneous decision reviewed by a higher court.

II. The Fourth Circuit Court of Appeals Properly Reviewed and Interpreted the Law of the State of Ohio.

Petitioners are advancing the novel theory that by filing a motion and succeeding to transfer a case pursuant to 28 U.S.C. 1406(a), the transfer acts as a practical matter to bar Respondent's ability to seek review of an interlocutory order from a district court upon a final decision in the case. Notwithstanding their averments to the contrary, none of the authority cited by Petitioners support their argument.

The cases cited by Petitioners do not involve the situation where due to a transfer the court of appeals was reviewing a legal interpretation from a district court outside its circuit. In *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976), and *United*

States v. Durham Lumber Co., 363 U.S. 522, 4 L.Ed.2d 1371, 80 S.Ct. 1282 (1960), both courts of appeals had previously scrutinized the state law involved to determine whether the district court was correct in its interpretation. Neither decision stood for the proposition that the court of appeals was bound by the legal interpretation of state law made by the district court; instead, the cases address the scope of review by this Court. This was also the situation in *Propper v. Clark*, 337 U.S. 472, 93 L.Ed. 1480, 69 S.Ct. 1333 (1949). Petitioner's reliance upon *Anderson v. City of Bessemer*, ___ U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), is particularly misplaced, since the question involved was the proper scope of review by a court of appeals of a factual finding by the district court where there was no jury. The case *sub judice* does not concern a finding of fact by the Ohio District Court, but dealt with the District Court's legal interpretation of the law in the State of Ohio.

In cases brought in the federal courts under diversity of citizenship jurisdiction, the court is required to apply the conflict of laws principles of the forum state involving what constitutes a substantive, as distinguished from a procedural, issue, and to interpret the state law in a manner consistent with the highest court of that state. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). With the sole exception of Judge Kinneary's interlocutory order in this particular case, no court in Ohio, state or federal, has ever upheld the proposition that a wrongful death action could be commenced in Ohio more than two years after the date of death. This was true both before and after the Ohio Wrongful Death Act was amended on February

5, 1982, and later deemed retroactive by the Ohio Supreme Court. *French v. Dwiggins*, 9 Ohio St.3d 32, 458 N.E.2d 827 (1984). The amendment to § 2125.02, O.R.C., did not change the substantive rights of any of the parties, nor did it change the previous intent and interpretation of the statute. The rewording simply made clear what had always been the mandate of the Ohio General Assembly—the two year time limitation is substantive as opposed to remedial in nature, it is a restriction qualifying and terminating the right of action, not merely a time limitation upon the remedy, and it applies to all causes of action filed in Ohio. *Sabol v. Pekoc*, 148 Ohio St. 545, 76 N.E.2d 84 (1947).

Judge Kinneary's decision further ignored that there was nothing in the borrowing language of § 2125.01, O.R.C., which excludes the concurrent application of the two-year time limitation in § 2125.02, O.R.C., either before or after it was amended. Despite recognizing the Greek time limitation was merely remedial, his decision further ignored the long established rule in Ohio that a remedial time limitation of another state or country never controlled in a case venued in Ohio, and that the foreign time limitation never controls where the foreign statute prescribes a longer period of time. *Howard v. Allen*, 30 Ohio St.2d 130, 283 N.E.2d 167 (1972); *Pinney v. Cummings*, 26 Ohio St. 46 (1875); and, *Myers v. Alvey Ferguson Co.*, 331 F.2d 223, 224 (6th Cir. 1964).

The Fourth Circuit Court of Appeals correctly recognized that the purpose of the borrowing language in § 2125.01, O.R.C., is to prevent a party coming to Ohio to enforce the wrongful death act of another state or country, when the cause of action had expired

in the other state or country due to the passing of its shorter time limitation.

The irony of Petitioner's argument to this Court (i.e., the Fourth Circuit should not consider the issue of what is the correct time limitation under Ohio law), is that when Respondent filed a motion with the District Court in Ohio asking it to certify the issue to the Sixth Circuit, Petitioners filed a memorandum contra strenuously objecting, and then later sought and obtained the transfer of the case outside the Sixth Circuit to North Carolina.

When plaintiffs sought and obtained the transfer of the case from Ohio to North Carolina under 28 U.S.C. § 1406(a), the entire case and all of the previous orders had transferred, including Judge Kinneary's interlocutory order denying the motion for summary judgment, as though they were the orders of the District court sitting in Asheville, North Carolina. *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866 (2nd Cir. 1950); *In Re Miller*, 485 F.2d 74 (5th Cir. 1973). As noted by the District Court in *United States v. City of Chicago*, 395 F.Supp. 329, 339-340 (N.D. Ill. E.D. 1975),

> "It appearing that the December 18 order was intended to be and is a preliminary injunction, the District Columbia court had continuing jurisdiction to modify it in any way for good reason . . . and that same authority traveled with the action when it was transferred here under 28 U.S.C. § 1404(a) . . . but now that the action is here [the district court in Illinois] the December 18 order is in law an interlocutory order of this court subject to modification at any time for good reason."

If there was not such a rule, it would allow a party to transfer a case to avoid appellate review of a favorable decision by a lower court, a proposition Petitioners are now tendering.

The case *sub judice* was properly before the Fourth Circuit pursuant to a final order. 28 U.S.C. § 1291; *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The Fourth Circuit in considering the case was not limited to only those issues the district court based its dismissal.The court could consider all issues that supported the final decision, regardless of whether they were raised through a cross-appeal. *United States and Interstate Commerce Commission v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924); *Dandridge v. Williams*, 397 U.S. 471, 475-6 n.6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); and, *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 605 n.3 (D.C. Cir. 1978). Insofar as the issue on cross-appeal established that there was no conflict between the laws of the State of Ohio and North Carolina, and both states require a wrongful death action be commenced within two years from the date of decedent's death, the issues on cross-appeal supported Judge Jones' dismissal and were, therefore, properly before and considered by the Fourth Circuit.

The Petition before this Court is nothing more than Petitioner's erroneous disagreement with the interpretation of a state law. The procedural history of this case reveals Petitioners have engaged in an elaborate scheme of forum shopping that has seen them bring suit against Respondent and other defendants in three different states. Not only is this forum shopping "regrettable", but it is also regrettable that

Petitioners have continuously attempted to deny Respondent the opportunity to have an erroneous decision reviewed by a court of appeals. There is no merit to Petitioners present argument that they can hide behind this decision by transferring the case from one state to another and divest Respondent of its opportunity to later have the interlocutory opinion reviewed. The decision by the Fourth Circuit Court of Appeals was a correct interpretation of Ohio law, and consistent with all prior decisions and statutes for the State. It is precisely for the reason of producing judicial economy and uniformity that there is judicial review of lower court decisions, and Petitioners cannot thwart this purpose by engaging in the tactics they have employed throughout.

III. Petitioners Right to Bring Suit in Ohio Terminated With Their Decision to Wait in Excess of Four Years Before Commencing the Action, and There was No Denial of Due Process of Law

By the time Petitioners filed their lawsuit in Ohio for the wrongful death of Theodoros Nisiotakis, their right for claim in Ohio had long since expired. Neither the decision by Judge Jones, the action by the Ohio General Assembly amending Ohio's wrongful death act, nor the decision by the Fourth Circuit Court of Appeals denied them their rights, for these rights expired after the second anniversary of decedent's death.

The syllabus in *Sabol v. Pekoc, supra*, written in 1947, reflects what has been and continues to be the position of the Ohio General Assembly and the highest court in the State of Ohio—the two-year time limitation contained in the Ohio Wrongful Death Act is substantive, and after two years have passed from

the date of death, not merely the remedy, but the entire cause of action and the right to proceed cease to exist.

> "1. The provision of Section 10509.167, General Code, that 'except as otherwise provided by law, every such action [for wrongful death] must be commenced within two years after the death of such deceased person,' is a restriction qualifying the right of the action and is not merely a time limitation upon the remedy. (Paragraph one of the syllabus in *Pittsburg, C. & St. L. Ry. Co. v. Hine, Admx.*, 25 Ohio St., 629, approved and followed.)
>
> 2. Where a petition in an action for wrongful death shows upon its face that the action was not commenced within two years after such death, a cause of action is not stated and a demurrer to the petition should be sustained." *Sabol v. Pekoc, supra*, paragraphs 1 and 2 of the syllabus.

The only reason Petitioners lost the opportunity to commence an action in Ohio for the wrongful death of Theodoros Nisiotakis was due to their own dilatory tactics and inadvertence which resulted in them waiting in excess of four years before filing the lawsuit. Neither the Ohio General Assembly, the courts or this Respondent have done anything to deny Petitioners due process under the laws of Ohio or the United States, and Respondent would respectfully request this Court to dismiss this argument and deny granting a writ of certiorari.

CONCLUSION

The issues addressed by the Fourth Circuit Court of Appeals in its decision were properly before the court and correctly decided. The decision was consistent with all known laws and precedent in the State of Ohio dating from 1875 to present. The Petition for Writ of Certiorari represents nothing more than Petitioners disagreement with the Fourth Circuit's interpretation of the law of a state; it does not involve any constitutional issues or issues involving significant federal questions in conflict with one another or in conflict with the laws of a state. Based upon the foregoing, Respondent/Defendant, Rockwell International Corporation, would respectfully request this Court to deny granting a writ of certiorari.

Respectfully submitted,

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